No. 95-1924

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JERRAL W. JONES and
MICHAEL V. MCCOY,

Petitioners,

v.

BOB KLEIN AND GENEVIEVE KLEIN, JOHN FRANK PENDERGRASS, SAM THOMPSON, MARGARET SCHAFFER, CLYMER LAW, DONNIE HALL, WAYNE FRANKLIN, GLEN MORRIS, and ROWLAND VERNON; CLASS REPRESENTATIVES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LONNIE C. TURNER
TURNER & MAINARD
110 West Commercial
Ozark, AR 72949
(501) 667-2155

DOUGLAS O. SMITH, JR.
WARNER, SMITH & HARRIS, P.L.C.
P. O. Box 1626
Fort Smith, AR 72902-1626
(501) 782-6041

REX M. TERRY
HARDIN, DAWSON & TERRY
P.O. Box 10127
Fort Smith, AR 72917-0127
(501) 452-2200
Counsel of Record

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

9pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Bethea v. Levi Strauss and Co., 916 F.2d 453 (8th Cir. 1990) 3

Briggs v. Pennsylvania R. Co., 334 U.S. 304 (1948) 3

Houghton v. McDonald Corp., 627 F.2d 858 (8th Cir. 1980) 3

Klein v. Jones, 980 F.2d 521 (8th Cir. 1992) .. 1, 2, 3, 5, 6

Klein v. Arkoma Production Co., 73 F.3d 779 (8th Cir. 1996) 1, 3, 4, 5, 6

Noel v. United Aircraft Corporation, 359 F.2d 671 (3d Cir. 1966) 3

RULES

Fed. R. Civ. P. 52(a) 5

Sup. Ct. R. 10(a) 5

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Respondents are a class of royalty owners consisting of some three thousand members. This action was initially filed in the Chancery Court of Franklin County, Arkansas, but was removed to the United States District Court for the Western District of Arkansas by the Defendants, who alleged the district court had jurisdiction by virtue of complete diversity of citizenship and amount in controversy.

The Petitioners were granted Summary Judgment in March of 1991. The Eighth Circuit Court of Appeals reversed and remanded for further proceedings consistent with its opinion. *Klein v. Jones,* 980 F.2d 521 (8th Cir. 1992), hereinafter *"Klein I."*

In *Klein v. Arkoma Production Co.,* 73 F.3d 779 (8th Cir. 1996), hereinafter *"Klein II,"* the Court determined that the trial court had exceeded the scope of the mandate issued in *Klein I.* The second reversal and remand was for entry of judgment in accordance with the Court of Appeals' opinion.

ARGUMENT

The factual background set forth in the Petition establishes the propriety of the Eighth Circuit's opinion. The Petitioners acknowledge that they are former owners of all the stock of Arkoma Production Company (Arkoma); that Arkoma was the lessee of mineral rights

from the Respondents; that Arkoma contracted to sell gas to a pipeline company (Arkla); that the gas purchase contracts required that Arkla either take or pay for specified quantities of gas at stipulated prices. Then disputes arose. On December 31, 1986, Petitioners resolved the dispute by selling Arkoma to Arkla, which enabled Arkla to gain control of the contracts and to unilaterally amend their pricing structures to the advantage of Arkla and the disadvantage of Respondents. Thus, Petitioners acknowledge the undisputed sequence: *i.e.*, contract, dispute, resolution. They continue to argue, however, that the Eighth Circuit has committed error in finding that there was, as a matter of law, a settlement of the take or pay controversy.

When Petitioners first received their grant of summary judgment, it was in the context of the trial court's determination that no royalty could ever be due on take-or-pay settlements. That legal dispute was the core of the contention of the parties prior to the first appeal. In *Klein I*, the Eighth Circuit clearly held that, in the context of this case, royalties were due at the time of the settlement of the take or pay obligations.

Petitioners sought rehearing, and suggested rehearing *en banc*, but were denied. It was only after the first remand that Petitioners challenged the facts surrounding the take-or-pay settlement. Before, they had argued primarily the legal proposition that no liability attached by virtue of a take or pay settlement. After *Klein I*, Petitioners attempted to re-characterize the facts in a manner to benefit themselves.

The Petitioners argue here that "the Court of Appeals never afforded Jones and McCoy the opportunity to contest these factual allegations." Petitioners' Pet., 2. Not so. Petitioners participated in a five day trial on the merits after the remand ordered in *Klein I*. The trial court entered a lengthy opinion in favor of Petitioners, which the Court of Appeals reversed again in *Klein II*.

In *Klein II*, the Court properly based its opinion, in substantial part, on the law of the case doctrine. *Klein I* had been remanded to the trial court for "further proceedings consistent with this opinion." *Klein I*, 980 F.2d at 533. That language has a settled meaning. Such a pronouncement operates to make the opinion a part of the mandate as completely as though the opinion had been set out at length. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948); *Noel v. United Aircraft Corporation*, 359 F.2d 671 (3rd Cir. 1966); *Bethea v. Levi Strauss and Co.*, 916 F.2d 453 (8th Cir. 1990). This "mandate rule," which is broader than the law of the case doctrine, extends to all facts which were determined by the Court of Appeals. It is not limited to matters of law. *Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858 (8th Cir. 1980).

The two opinions of the Eighth Circuit are not an "extraordinary injustice" as suggested by the Petitioners (Petitioners' Pet., 3). The opinions are wholly consistent with the facts in this diversity action, and with Arkansas law.

Moreover, *Klein II* did not rely solely upon the law of the case doctrine. The Court of Appeals did not refuse to

consider "the extensive factual findings in favor of Petitioners, made after a five day trial." Petitioners' Pet., 7. The Petitioners stated that:

> Jettisoning the district court's findings on these factual points, without even suggesting that they were "clearly erroneous," was error warranting summary vacation and remand for further consideration. *Id.*, 12-13.

That is an inaccurate statement, and is belied by a careful reading of *Klein II*.

It is true that in *Klein II*, the Court, in discussing *Klein I*, stated that it drew a legal conclusion that Jones and McCoy had settled the take-or-pay claims in *Klein I*, and that became the law of the case which the district court was bound to follow. *Klein II*, at 784. However, the Court went further:

> We note that the district court's rejection of our holding was based mainly on the sequence of events. The district court did not find that no settlement had ever taken place, but that the settlement did not occur until Jones and McCoy were out of the picture (when the gas purchase contract was reformed). The district court is wrong for two reasons: a) we rejected this argument in the first appeal; and b) *finding that the actual reformation of the gas purchase contract is the settlement does not reflect economic reality.* There was no consideration for the reformation. The quid pro quo to enable Arkla to renegotiate the contract was exchanged in December 1986 when Arkla bought Arkoma from Jones and McCoy. In other words, Jones and McCoy received the money, the "premium" to settle the take-or-pay claims. [Emphasis supplied] *Id.*, 73 F.3d at 785, fn. 8.

The Court then stated:

> Our legal conclusion that the transaction was a settlement was based upon the undisputed context of the negotiations leading up to the agreement. . . . We have again reviewed the record and remain convinced that our conclusion is correct. *Id.*, 785.

That statement from *Klein II* is supported by the Petitioners' own factual statement here. There were contractual agreements, disputes arose, and those disputes were resolved by Petitioners' sale of Arkoma to Arkla. In dealing with this the second time, the Eighth Circuit "again reviewed the record," and concluded that that issue had been correctly decided. The Eighth Circuit, in copious detail, pointed out in fn. 9 the specific facts which led it to that inescapable conclusion, and pointed out that "all of this evidence was available to both the district court and to this court in *Klein I.*" *Id.*, 785, fn. 9.

Thus, the Eighth Circuit *did* review the record prior to rendering its decision in *Klein II*, and the foregoing statements make clear, in addition to the law of the case doctrine, the Eighth Circuit determined that the findings of the trial court were clearly erroneous. Such a finding is entirely consistent with Fed. R. Civ. P. 52 (a), and certainly is within the power of the court.

Petitioners acknowledge that the standard for this Court's grant of certiorari in this case is set forth in Sup. Ct. R. 10 (a). This Court must conclude that the Eighth Circuit has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Petitioners' showing

to this Court falls far short of that high standard of review.

Petitioners had an opportunity to present their evidence, and were allowed to do so in a five day trial. They brought forward every argument against the ultimate conclusion that this was a take-or-pay settlement, and that they received a premium that the Respondents, as a class, are entitled to share. They prevailed on the merits in the trial court, but for reasons made clear by the Eighth Circuit on appeal, judgment in their favor was reversed. Petitioners then presented these same arguments to the Eighth Circuit in their petition for rehearing and suggestion for rehearing *en banc*, but they were denied. The Eighth Circuit's opinion is wholly in accord with the law and the facts, and should not be disturbed.

We further point out that Petitioners were not the only Defendants in the court below. Noticeably absent from this effort to invoke this Court's jurisdiction on certiorari are the Arkla parties, which the Eighth Circuit found to have breached the implied covenant to market contained within the leases given by the Respondents and held by the Arkla parties. *Klein II*, at 787-788.

Finally, the Petitioners' arguments with respect to this matter should be foreclosed since they made no effort to petition this Court after *Klein I*. Nor did the Petitioners raise their constitutional arguments in the Eighth Circuit either in their brief or petition for rehearing and suggestion for rehearing *en banc*.

CONCLUSION

The decision of the Eighth Circuit is fully supported by the law and the evidence, and the petition for certiorari should be denied.

Respectfully submitted,

LONNIE C. TURNER
TURNER & MAINARD
110 West Commercial
Ozark, AR 72949
(501) 667-2155

DOUGLAS O. SMITH, JR.
WARNER, SMITH &
HARRIS, P.L.C.
P. O. Box 1626
Fort Smith, AR 72902-1626
(501) 782-6041

REX M. TERRY
HARDIN, DAWSON & TERRY
P.O. Box 10127
Fort Smith, AR 72917-0127
(501) 452-2200

Counsel for Respondents